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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

THE NVIDIA GPU LITIGATION

) Case No. C 08-4312 JW

CLASS ACTION

PLAINTIFFS' OPPOSITION TO BROWN
MOVANTS' MOTION FOR
PRELIMINARY INJUNCTION

This Document Relates To:

PLAINTIFFS' OPPOSITION TO
MOVANTS' MOTION FOR
PRELIMINARY INJUNCTION

ALL ACTIONS.

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TABLE OF CONTENTS

| | Page |
|---|------|
| I. INTRODUCTION | 1 |
| II. THE HP REPLACEMENT MODELS MEET OR EXCEED THE REQUIREMENTS OF THE SETTLEMENT AGREEMENT | 4 |
| A. NVIDIA Proposed The CQ56 To Replace The HP Laptops And The Asus To Replace The HP Tablet..... | 4 |
| B. Plaintiffs Hired An Independent Expert To Evaluate The Replacement Models..... | 5 |
| 1. The CQ56 is Similar to or Better Than the Laptops Being Replaced..... | 6 |
| 2. An Election Between the CQ56 and the Asus For Tablet Owners Complies With the Settlement Agreement | 9 |
| C. Plaintiffs Insisted On An Election For Tablet Owners | 11 |
| D. This Settlement Is Very Beneficial To The Class Members..... | 11 |
| E. The Intent Of The Parties Must Be Considered..... | 13 |
| F. The Brown Movants' Proposed Relief Is Subjective And Arbitrary | 14 |
| III. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE | 15 |
| A. Plaintiffs Undertook Significant Efforts to Vet the Suitability of the Replacement Models..... | 15 |
| B. Experienced Counsel Recommend Approval of the Replacements | 16 |
| C. The Class Members' Reaction to the Settlement Relief is Instructive | 16 |
| D. The Few Individual Complaints Confirm This Settlement Is Superior To Continued Litigation | 17 |
| IV. THE BROWN CLASS MOVANTS' COUNSEL IS NOT MOTIVATED TO PROTECT CLASS MEMBERS' INTEREST, BUT RATHER HIS SELF-PROFESSED GOAL OF TORT REFORM | 18 |
| V. THE BROWN MOVANTS ARE NOT ENTITLED TO INJUNCTIVE RELIEF | 21 |
| A. Likelihood of Irreparable Harm..... | 21 |
| B. Likelihood of Success on the Merits..... | 22 |
| C. Balance of Hardships | 22 |
| D. Public Interest | 23 |
| VI. CONCLUSION..... | 25 |

1

2

3 **TABLE OF AUTHORITIES**

4

| | Page(s) |
|---|----------------|
| FEDERAL CASES | |
| <i>Alliance for the Wild Rockies v. Cottrell</i> , No. 09-35756, 2011 U.S. App. LEXIS 1473 (9th Cir. Jan. 25, 2011)..... | 21 |
| <i>Brooks v. Georgia State Bd. of Elections</i> , 59 F.3d 1114 (11th Cir. 1995) | 14 |
| <i>Browning v. Yahoo! Inc.</i> , No. C04-01463 HRL, 2007 U.S. Dist. LEXIS 86266 (N.D. Cal. Nov. 16, 2007)..... | 17 |
| <i>Davoodi v. Imani</i> , No. C 11-0260 SBA, 2011 U.S. Dist. LEXIS 17758 (N.D. Cal. Feb. 9, 2011)) | 22 |
| <i>Fulford v. Logitech, Inc.</i> , No. 08-cv-02041 MC, 2010 U.S. Dist. LEXIS 29042 (N.D. Cal. Mar. 5, 2010) | 15 |
| <i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998) | 15, 17 |
| <i>In re Consol. Pinnacle W. Sec. Litig.</i> , 51 F.3d 194 (9th Cir. 1995) | 15 |
| <i>In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.</i> , MDL Dkt. No. 901, 1992 U.S. Dist. LEXIS 14337 (C.D. Cal. June 10, 1992)..... | 16 |
| <i>In re Warner Commc'n's Sec. Litig.</i> , 798 F.2d 35 (2d Cir. 1986)..... | 14 |
| <i>Kirkorian v. Borelli</i> , 695 F. Supp. 446 (N.D. Cal. 1988) | 16 |
| <i>Koerner v. Grigas</i> , 328 F.3d 1039 (9th Cir. 2003) | 21 |
| <i>Language Line Servs. v. Language Servs. Assocs., LLC</i> , No. C 10-02605 JW, 2010 U.S. Dist. LEXIS 140350 (N.D. Cal. July 13, 2010) | 3, 4 |
| <i>Linney v. Cellular Alaska P'ship</i> , 151 F.3d 1234 (9th Cir. 1998) | 17 |
| <i>Lydo Enter., Inc. v. Las Vegas</i> , 745 F.2d 1211 (9th Cir. 1984) | 21, 22 |

| | | |
|----|---|------------|
| 1 | <i>Lundell v. Dell, Inc.</i> , No. C 05-3970 JW/RS, 2006 U.S. Dist. LEXIS 90990 (N.D. Cal. Dec. 4, 2006) | 11, 12, 23 |
| 2 | | |
| 3 | <i>Maxim Integrated Prods., Inc. v. Quintana</i> , 654 F. Supp. 2d 1024 (N.D. Cal. 2009) | 21, 22, 23 |
| 4 | | |
| 5 | <i>Mazurek v. Armstrong</i> , 520 U.S. 968, 117 S. Ct. 1865 (1997)..... | 21 |
| 6 | | |
| 7 | <i>Officers for Justice v. Civil Serv. Comm'n</i> , 688 F.2d 615 (9th Cir. 1982) | 15 |
| 8 | | |
| 9 | <i>Torrissi v. Tuscon Elec. Power Co.</i> , 8 F.3d 1370 (9th Cir. 1993) | 15 |
| 10 | | |
| 11 | <i>Zamani v. Carnes</i> , 491 F.3d 990 (9th Cir. 2007) | 21 |
| 12 | | |
| 13 | STATE CASES | |
| 14 | | |
| 15 | <i>Osumi v. Sutton</i> , 151 Cal. App. 4th 1355 (2007) | 13 |
| 16 | | |
| 17 | <i>Roden v. Bergen Brunswig Corp.</i> , 107 Cal. App. 4th 620 (2003) | 13 |
| 18 | | |
| 19 | STATE STATUTES | |
| 20 | | |
| 21 | Cal. Civ. Code, § 1636..... | 13 |
| 22 | | |
| 23 | DOCKETED CASES | |
| 24 | | |
| 25 | <i>In re HP Inkjet Printer Litig.</i> , No. C-05-3580 JF (PVT) (N.D. Cal. filed Jan. 17, 2011)..... | 19 |
| 26 | | |
| 27 | <i>In re HP Laser Printer Litig.</i> , No. 07-0667 AG (C.D. Cal. filed June 6, 2007) (the “HP Printer Case”) | 19, 20 |
| 28 | | |
| | <i>San Jose Entm't Grp. v. City of San Jose</i> , No. C 11-00207 JW, at 1 (N.D. Cal. Feb. 16, 2011) | 21 |
| | | |
| | <i>The Facebook, Inc. v. ConnectU, Inc.</i> , No. C 07-01389 JW (N.D. Cal. June 25, 2008) | 13, 14 |
| | | |

1 **I. INTRODUCTION**

2 On December 20, 2010, this Court granted final approval of this Settlement. The Court-
 3 approved Settlement provides excellent and numerous forms of relief for all Class Members.
 4 Under the terms of the Settlement, all qualified claimants with approved claims are eligible to
 5 receive either: (i) a repair of their Dell or Apple Class Computer; or (ii) a new replacement
 6 computer for HP Class Computers. In addition, qualified claimants who previously fixed, or
 7 would prefer to fix and keep their Class Computers, may also submit claims for reimbursement
 8 of repair expenses. There is no limit on the number of repair, replacement or reimbursement
 9 claims a qualified Class Member may submit. They also can submit claims in any of the
 10 categories. Someone with two computers eligible for repairs, three for replacement, and a
 11 reimbursement claim for prior attempts to fix their five computers, can submit up to 10 claims in
 12 that scenario. For example, Movant Brown filed two separate claims determined to be valid and
 13 Movant Schneider submitted three claims for replacement computers. NVIDIA is far along in
 14 paying all costs associated with administrative shipping and notice, which were estimated at
 15 about \$2 million at final approval. *See* Supplemental Declaration of Katie Horton Re: Notice
 16 Procedures (Dkt. 304 ¶ 28). The claims deadline is March 14, 2011.

17 The Settlement Agreement this Court approved required the parties to “meet and confer
 18 in good faith and agree on a suitable replacement of like or similar kind or equal or similar
 19 value” for the HP Class Computers. Settlement Agreement ¶ 2.6. Following the Court’s grant of
 20 final approval, the parties continued to meet and confer concerning the various computer models
 21 that were to be provided to Class Members as “replacement computer[s]” pursuant to ¶ 2.6 of the
 22 Settlement Agreement. Early in the negotiations, NVIDIA proposed providing Class Members
 23 eligible for replacement with a used computer. After that was rejected by Class Counsel, a new
 24 Compaq CQ50 laptop computer (the “CQ50”) for laptop Class Computers, and a new ASUS
 25 T101MT-EU17-BK tablet computer (the “Asus”) for tablet Class Computers.

26 Following Defendants’ proposal, Plaintiffs’ counsel, out of their own pocket, retained
 27 Nader Bagherzadeh, Ph.D. and Professor of Electrical Engineering and Computer Science, at the
 28 Henry Samueli School of Engineering at the University of California, Irvine, to evaluate whether

1 the two computer models NVIDIA proposed were suitable replacements under ¶ 2.6 of the
 2 Settlement Agreement. As he started his review, NVIDIA advised Plaintiffs' counsel that it
 3 intended to propose the HP Compaq brand CQ56-115DX (the "CQ56") as a replacement model
 4 rather than the CQ50. This was an offer of new computers with full new computer warranties,
 5 even though the Settlement Agreement does not anywhere require new computers or full new
 6 computer warranties.

7 Upon completing his evaluation of the two replacement computers proposed by NVIDIA,
 8 Dr. Bagherzadeh concluded the CQ56 is "superior in almost all major areas of comparison" to
 9 the HP laptops, and an election between the CQ56 and the Asus for HP tablet owners would
 10 satisfy the Settlement Agreement. Declaration of Dr. Nader Bagherzadeh ("Bagherzadeh
 11 Decl."), Exs. B, C.

12 Following the completion of Dr. Bagherzadeh's reports, the parties conferred and
 13 negotiated further. While NVIDIA initially declined to change its offer, the parties conducted
 14 extensive negotiations until the parties agreed that: (i) the CQ56 would be provided as a
 15 replacement for eligible laptop Class Computers; and (ii) qualified Class Members would have
 16 the option of choosing either the CQ56 or the Asus as a replacement for their tablet Class
 17 Computers. The Settlement website was updated accordingly to inform Class Members of the
 18 computers provided in the event they elected to replace their Class Computers. Class Members
 19 wedded to their particular computers could still seek out individual repairs, until the deadline to
 20 submit claims, through HP or any repair shop and submit the bill as a settlement reimbursement
 21 claim.

22 The benefits of the Settlement in its current form are substantiated by the claims made to
 23 date. As of February 28, 2011, 18,942 HP Class Members submitted claims to obtain
 24 replacement computers. Declaration of Dan Rosenthal filed by NVIDIA on March 4, 2001
 25 ("Rosenthal Decl."), ¶ 6. Significantly, the 18,942 HP replacement claims submitted are over
 26 two thirds of the total valid claims submitted — 28,355 claims were filed, meaning the HP
 27 replacement claims constitute approximately 70% of the total filed claims, even though a larger
 28 number of potential Class Members were entitled to the Apple or Dell repairs, and all Class

1 Members were eligible for reimbursement. Rosenthal Decl. ¶ 7. This is significant because the
 2 higher claims rate for the replacement option, which was available to 3,435,007 fewer potential
 3 Class Members, totally undermines the Brown Movants' speculative assertions that the
 4 replacement claims were depressed for any reason. *See* Decl. of Katie Horton in Support of
 5 Final Approval of Settlement (Dkt. 259) ("Horton Decl.") ¶ 8 (explaining that of the 5,123,594
 6 Class Members notified, 1,688,587 were HP owners); *see also* Rosenthal Decl. ¶ 12 (explaining
 7 rate of claims for this Settlement is typical and in line with his experience).

8 Against the backdrop of this very successful and highly beneficial Settlement, providing
 9 completely new replacement computers with new and full warranties, a total of five individuals,
 10 the "Brown Movants," filed a Motion to Enforce The Settlement (the "Brown Motion"),
 11 claiming the new computer models being used to replace the HP Class Computers are not of
 12 "like or similar kind" to the original, older, computers pursuant to the Settlement Agreement.
 13 Notably, these five individuals are represented by Ted Frank, a self-proclaimed tort reformer and
 14 attorney who is a serial class action objector. The Brown Motion is accompanied by a report
 15 purportedly authored by one of Ted Frank's acquaintances, Michael A. Vlastone ("Vlastone" and
 16 the "Vlastone Report"), a self-proclaimed expert, who lacks any formal training or expertise in
 17 the area of notebook, laptop or tablet computers. Even a cursory examination of Mr. Vlastone's
 18 "credentials" and his conduct in another matter reveals that he lacks Dr. Bagherzadeh's stature
 19 and expertise to render an opinion in this matter.

20 Short on facts, the Brown Movants also fail on the law. Nowhere in their papers do the
 21 Brown Movants even set forth the standard for granting injunctive relief, let alone make the
 22 requisite "clear showing" required. *Language Line Servs. v. Language Servs. Assocs., LLC*, No.
 23 C 10-02605 JW, 2010 U.S. Dist. LEXIS 140350, at *5 (N.D. Cal. July 13, 2010). Even if they
 24 could do so, the relief they seek is entirely inappropriate - it amounts to asking the Court to
 25 rewrite the terms of a settlement agreement, based on a proposed order with opposing counsel's
 26 subjective creation of 27 separate factors, which neither party agreed to, and which are not even
 27 adopted by the Vlastone Report.

28

1 The Brown Motion amounts to nothing more than an attempt by moving counsel to
 2 publicize a tort reform agenda at a tremendous expense to Class Members. It is notable that
 3 while counsel seeks a mandatory and prohibitory preliminary injunction, the most extreme civil
 4 remedies available, he filed a brief which fails to even include or discuss the legal standard for
 5 this relief. Meanwhile, he promotes himself on a web blog and to the media for the publicity
 6 splash of filing an injunction motion, which has absolutely no injunction legal analysis. The
 7 motion should be denied in its entirety.

8

9 **II. THE HP REPLACEMENT MODELS MEET OR EXCEED THE
 REQUIREMENTS OF THE SETTLEMENT AGREEMENT**

10 The Brown Movants incorrectly assert that the Replacement Models offered to HP Class
 11 Members are not of “like or similar kind” to the original computers they are intended to replace,
 12 and final implementation of the Settlement should therefore be enjoined. The Brown Movants’
 13 argument, however, lacks merit and is belied by the fact that: (i) the HP Replacement Models are
 14 new computers with new computer warranties and conform to the requirements of the
 15 Settlement, a conclusion reached by Plaintiffs’ highly qualified expert; (ii) the Settlement is very
 16 beneficial to Class Members and disruption of its administration would be prejudicial to over
 17 26,000 Claimants; and (iii) the Brown Movants do not even mention, let alone satisfy the
 18 standard for a preliminary injunction.

19

20 **A. NVIDIA Proposed The CQ56 To Replace The HP Laptops And The
 Asus To Replace The HP Tablet**

21 The Settlement Agreement requires the parties to “meet and confer in good faith and
 22 agree on a suitable replacement of like or similar kind or equal or similar value” for the HP Class
 23 Computers. Settlement Agreement ¶ 2.6. Class Computers subject to replacement include (1)
 24 several HP Pavillion and Compaq Presario laptop models (“Laptops”) and (2) one tablet
 25 computer line — the Pavilion Tx1xxx (“Tablet”). *Id.* at Amendment No. 2. NVIDIA proposed
 26 the Laptops be replaced with the CQ56, and the Tablet be replaced with the Asus (collectively
 27 the “Replacement Models”). Westerman Decl. ¶ 4.

1 NVIDIA maintained the Replacement Models were in compliance with the Settlement
 2 Agreement. Westerman Decl. ¶ 2. To support its position, NVIDIA provided Plaintiffs with the
 3 Declaration of Keith Katcher, NVIDIA's Vice President of Operations, Assembly/Test, and
 4 referred Plaintiffs to the previously filed Declaration of NVIDIA's expert, Jon Peddie from their
 5 opposition to class certification.

6

7 **B. Plaintiffs Hired An Independent Expert To Evaluate The
 Replacement Models**

8 Plaintiffs considered the declarations but decided, over NVIDIA's objections, and at
 9 Class Counsel's expense, to hire an independent expert to evaluate the Replacement Models to
 10 ensure compliance with the Settlement Agreement. Westerman Decl. ¶ 5. Plaintiffs retained
 11 University of California at Irvine School of Engineering Professor of Electrical Engineering and
 12 Computer Science Dr. Nader Bagherzadeh. Dr. Bagherzadeh was provided with the Katcher and
 13 Peddie declarations, as well as the complaints Class Counsel had received to date regarding the
 14 Replacement Models, and was instructed to provide his own analysis and opinion. Westerman
 15 Decl. ¶ 5. After performing his evaluation, Dr. Bagherzadeh concluded the CQ56 is "superior in
 16 almost all major areas of comparison" to the Laptops. *See A Report On Nvidia Laptop*
 17 *Replacement By Nader Bagherzadeh ("Laptop Report")*, Bagherzadeh Decl., Ex. C, at 4. With
 18 respect to the Asus as a replacement for the Tablet, Dr. Bagherzadeh found the Asus has much
 19 longer battery life operation than the Tablet, is lighter weight and provides touch screen
 20 navigation but has certain disadvantages to the Tablet. Accordingly, Dr. Bagherzadeh concluded
 21 "since the needs of class members may have been different when they purchased their original
 22 computers, it is best to provide an option where class members can choose between two different
 23 replacements." *See A Report On Nvidia Tablet Replacement By Nader Bagherzadeh ("Tablet*
 24 *Report")*, Bagherzadeh Decl., Ex. B, at 3. Dr. Bagherzadeh recommended an election between
 25 the CQ56 and the Asus be provided to Class Members owning the Tablet to satisfy the
 26 Settlement Agreement. *Id.*

27

28

1

2 **1. The CQ56 is Similar to or Better Than the Laptops Being**
Replaced

3 Dr. Bagherzadeh examined the CQ56 in comparison to the Laptops and used the
 4 following metrics: (1) Graphics Processing Unit (GPU) performance, (2) screen size, (3) Central
 5 Processing Unit (CPU) rating, (4) DRAM features, (5) hard disk, (6) Optical Disk Drive (ODD),
 6 and (7) WLAN capabilities. Laptop Report. Dr. Bagherzadeh was given most, if not all,
 7 Replacement Model complaints received by Class Counsel at that time so he could see the
 8 concerns of potential Class Members. Dr. Bagherzadeh concluded the CQ56 is “superior in
 9 almost all major areas of comparison.” Although Plaintiffs take issue with the qualifications of
 10 Movants’ purported “expert,” as discussed below, it is worth noting that Dr. Bagherzadeh
 11 evaluated essentially the same metrics that Mr. Vlastone’s “Executive Summary” says should be
 12 evaluated.

13 As to the GPU (the litigated issue in the underlying case), Dr. Bagherzadeh noted all of
 14 the Class Computers he examined used the NVIDIA GeForce GO 6150 (first manufactured in
 15 2005), while the replacement unit uses a Mobility Radeon HD 4250 (first manufactured in 2010).
 16 Further, bus interface - the method by which data is moved back and forth between the GPU and
 17 the CPU - in the Laptops is a full generation older than that in the CQ56 (version 3.0 as opposed
 18 to version 2.0). This means the CQ56’s GPU interacts with the computer significantly faster
 19 than the GPUs in the original Laptops. In addition, the CQ56’s GPU has a dedicated 512 MB of
 20 memory, where the Laptops share memory with the CPU, meaning they only have access to 256
 21 MB of memory. In practice, this means the CQ56 can process data significantly faster, because
 22 it will only need to write information to the hard drive half as often as the original models. Hard
 23 drives are significantly slower than RAM, so the fewer times a GPU needs to access the hard
 24 drive, the faster that GPU will perform. Dr. Bagherzadeh also found the CQ56’s GPU has faster
 25 main and memory clocks than the GPUs it is replacing, including a main clock that is 30% faster
 26 than the Class Computers and noted “it is usually a good rule of thumb that a faster clock will
 27 improve [] performance.” Laptop Report at 2. In summary, Dr. Bagherzadeh concluded the
 replacement GPU is “superior in all aspects of evaluation.” *Id.*

1 The next factor measured by Dr. Bagherzadeh was the screen size. Dr. Bagherzadeh
 2 noted one of the many Laptop models, the Pavilion dv9xxx, has a 17" screen, which is larger
 3 than the CQ56's screen. Laptop Report at 4. He found all other models being replaced were
 4 either smaller or equal to the CQ56 screen. *Id.* He concluded “[a]lthough the replacement unit
 5 has a smaller screen size than laptop a (Pavilion dv9000), having a new computer which meets or
 6 exceeds some of the key performance features should be more than adequate to satisfy the
 7 settlement agreement.” *Id.*

8 With respect to the computers' CPUs, Dr. Bagherzadeh found the Laptops, with one
 9 exception, are equipped with AMD Turion Dual Core TL-64 processors, first manufactured
 10 about five years ago. The CQ56 is equipped with a “recently developed” AMD V140 single core
 11 processor. Laptop Report at 3. Dr. Bagherzadeh concluded the advantages to having a dual core
 12 processor are offset here by the advances in technology that occurred over those five years
 13 giving rise to the single core processor in the CQ56. He found “if a program can be parallelized,
 14 meaning be able to use both cores to do a computation task”, then the dual core is more useful,
 15 but that in cases where programs act sequentially, the single core processor is superior. The
 16 expert also noted that dual core processors are advantageous for multi-tasking, but this advantage
 17 is not absolute and depends on a number of other factors, including memory and CPU speed,
 18 areas in which the CQ56 has an advantage. The expert explained “since the DDR2 incorporated
 19 in the original laptops is half the speed of the DDR3 in the CQ56, dual core processors of the
 20 original laptops will not be able to take advantage of their full potential as compared with the
 21 CQ56's single core.” *See also*, Bagherzadeh Decl., Ex. D (“Report # 3”), at 1.¹ Further, the
 22 CQ56's CPU is more efficient and uses less battery power. On balance, whether one of these
 23 processors is superior to another depends on the uses to which it will be put - as Dr. Bagherzadeh
 24 noted, it is likely that most Class Members will be using programs designed for single core
 25 processors, and therefore, the CQ56's processor is superior. To the extent Class Members seek
 26 to multi-task, the advantages of the older dual-core processor are largely offset by the other
 27 hardware specifications of the newer CQ56.

¹ Dr. Bagherzadeh prepared a Report # 3 to discuss certain issues raised in the moving papers.

1 Vlastone contends the CQ56 is not a suitable replacement for the Laptops primarily
 2 because of the differences in the computers' CPUs. Vlastone Report at 14. While Vlastone's
 3 conclusion is deficient for several reasons, a primary reason is Vlastone fails to address the effect
 4 of the advances in technology that occurred over those five years in single core processors.
 5 Vlastone also ignores the applications in which the CPUs would be put to use and, the impact of
 6 the CQ56's newer and better memory. Unlike Vlastone, Dr. Bagherzadeh did consider all of
 7 these factors and concluded that the newer CPU in the CQ56, in conjunction with other features,
 8 compared favorably to that in the Laptops. In summary, despite the Brown Movants' assertions
 9 about their older dual core processors, Dr. Bagherzadeh determined the CQ56's CPU sufficiently
 10 meets or, depending on the use, exceeds the performance of processors in the Class Computers.

11 With respect to the DRAM, Dr. Bagherzadeh concluded that the CQ56, which uses a
 12 newer generation DRAM, is "superior to all the originals." Laptop Report at 3. He found the
 13 CQ56's DRAM uses less power and achieves faster speeds than the Laptops. *Id.* Specifically,
 14 "in terms of power efficiency, the chips used in the original laptops are no match for the CQ56.
 15 This is true for DRAM memory chips as well. DDR3s consume less power than DDR2s. In a
 16 rough estimate, close to 50% reduction in power can be achieved going from an older technology
 17 to a newer one." *See also*, Bagherzadeh Decl., Ex. D, Report # 3 at 2.

18 Dr. Bagherzadeh's evaluation of the hard disks reached a similar conclusion. He found
 19 (1) the hard disk space is "similar to most of the originals in terms of size," (2) "[t]he only
 20 [Laptop] with half as much disk storage as the [CQ56] was [the F500]", and (3) the CQ56's
 21 RPM (the speed at which the hard disk can be accessed) is "as good as the best original." Laptop
 22 Report. Again, the CQ56 is superior in this category.

23 Dr. Bagherzadeh found the optical disk drives in both the CQ56 and the Laptops are
 24 identical. All of the optical disk drives are DVR drives with both read and write functions, at 8X
 25 speed.² Laptop Report at 3.

27

² The Brown Movants refer to a "lightscribe" feature, which labels DVDs. This convenience
 28 feature is not in the CQ56, but the technical features of the drives are the same.

1 Dr. Bagherzadeh also compared the WLAN capabilities of the CQ56 and the Laptops.
 2 He concluded that three of the Laptops have Bluetooth capability, which the CQ56 lacks.
 3 However, the CQ56 has the most up to date and most popular WiFi standard, 802.11n, which
 4 none of the older Laptops support. Further, Dr. Bagherzadeh noted if a user wants Bluetooth
 5 capability, the CQ56 has a USB port compatible with Bluetooth dongles, which cost about \$10.

6 Finally, Dr. Bagherzadeh delineated additional benefits to Class Members receiving the
 7 CQ56. The CQ56 supports 64 bits, meaning it can run Windows 7, the newest operating system
 8 “considered by many to be more stable and efficient” than the older operating systems on the
 9 Laptops (Windows XP and Vista). Windows 7 was not available until March of 2010, so the
 10 vast majority of Class Computers are unlikely to have it. Thus, most Class Members are
 11 receiving an upgraded operating system in addition to the improved hardware described above.

12 Significantly, a new CQ56 “provides a reset on the number of years one could have for a
 13 fully functional laptop,” because it “clearly increases the life span of the original laptops as far as
 14 display, hard drive, keyboard and mother board are concerned, which are usually the first parts
 15 on a laptop that fail.” Laptop Report at 3. The value of providing new, unworn parts that will
 16 extend the useful life of a computer cannot be discounted. Class Computers were purchased as
 17 early as March 2006, and are approaching, or already have reached, the end of their useful life
 18 cycles, even absent the defective GPUs in this litigation. Class Members will receive a new
 19 computer under HP warranty, with a new expected useful life. *Id.* at 4. Based on Dr.
 20 Bagherzadeh’s conclusions, it is clear the CQ56 is of “like or similar kind” to the Laptops it is
 21 intended to replace.³

22 **2. An Election Between the CQ56 and the Asus For Tablet
 23 Owners Complies With the Settlement Agreement**

24 Dr. Bagherzadeh’s conclusion with respect to the Asus was “since the needs of class
 25 members may have been different when they purchased their original computers, it is best to
 26 provide an option where class members can choose between [the] two different replacements.”

27 ³ While Class Counsel relied primarily on Dr. Bagherzadeh’s report, the information NVIDIA
 28 provided via Mr. Katcher’s and Mr. Peddie’s declarations was also relevant.

1 Tablet Report at 3.⁴ The expert reasoned that the Asus is superior to the Tablet in terms of
 2 portability and battery life, but the CQ56 is superior in terms of computational power. *Id.* Thus,
 3 depending on the user's preferences, the Asus or the CQ56 will provide a remedy allowing the
 4 Class Member to perform basically the same functions as the Tablet.

5 Dr. Bagherzadeh compared the Asus to the Tablet on the basis of the respective
 6 machines' GPU, screen size, CPU, DRAM, hard disk, optical drive, WLAN, camera and power
 7 consumption. Dr. Bagherzadeh's findings in this regard reinforce the conclusion that the Asus is
 8 a superior choice for users focused on portability, as it streamlines many features that would be
 9 superfluous to such users. He concluded the Asus GPU uses an advanced fabrication technology
 10 which is more efficient and, therefore, preserves battery life, although it does give up some
 11 processing power as a result. Tablet Report at 3. In short, the Asus's GPU is more suited to
 12 portability than to heavy calculations. Similarly, the Asus's CPU, while not as computationally
 13 powerful as the Tablet's, is significantly more efficient, using approximately 1/7 the power that
 14 the older Tablet CPU consumes, significantly extending battery life. *Id.* Dr. Bagherzadeh also
 15 noted the Asus's screen size is a more portable 10", compared to the Tablet's 12". Also, because
 16 the Asus "has touch screen and retractable stylus in addition to the keyboard, it is more in line
 17 with the current trend of having the convenience of soft keyboard as demonstrated by recent
 18 introduction of iPad from Apple and Samsung's Galaxy." *Id.* at 4.

19 Regarding hard disks, Dr. Bagherzadeh stated the Tablet's hard disk is slightly larger
 20 (200 GB vs. 160 GB), but the Asus's hard disk is faster and improves performance. Dr.
 21 Bagherzadeh found the WLAN capabilities to be similar. But, due to certain disadvantages of
 22 the Asus over the Tablet, Dr. Bagherzadeh recommended Tablet owners receive a choice
 23 between the Asus and the CQ56.

24 Vlastone's lack of expertise is highlighted by the fact that he performed virtually no
 25 analysis on the comparability of the Asus and the CQ56. As Dr. Bagherzadeh explains, the
 26

27 ⁴ Of note, Dr. Bagherzadeh analyzed the Asus T101 MT-EU17-BK but Class Counsel was
 28 recently informed by NVIDIA that the replacement model for the Tablet will be the upgraded,
 newer Asus T101 MT-EU37-BK.

1 speed of the CPU is but one factor and any disadvantage arising from technological differences
 2 between the Asus and the computers it will be replacing is addressed by the option of the CQ56.
 3 Vlastone's analysis, again, fails to take this into consideration.

4 **C. Plaintiffs Insisted On An Election For Tablet Owners**

5 Based on their expert's conclusions, Plaintiffs informed NVIDIA that they would agree
 6 to the Replacement Models pursuant to the Settlement Agreement provided Tablet users were
 7 allowed to choose between the CQ56 and the Asus. Initially, and for some time, NVIDIA
 8 refused. These negotiations were intense and included phone calls between the respective
 9 lawyers, experts, and NVIDIA executives. After negotiations that on more than one occasion
 10 appeared at an impasse, NVIDIA agreed to provide a choice between the CQ56 and the Asus as a
 11 Replacement Model for the Tablet. Westerman Decl. ¶ 9.

12 **D. This Settlement Is Very Beneficial To The Class Members**

13 Dell and Apple owners are submitting their computers to their respective manufacturers
 14 for repairs, and owners of Class Computers have been submitting their claims for
 15 reimbursement. Administration of replacement claims also is well under way.

16 The Brown Movants claim that Class Members lack an ability to have their computers
 17 repaired if they so choose because HP parts are "no longer sufficiently available for use as
 18 replacement parts." The Brown Movants overlook two facts. First, while HP may not have
 19 enough parts to repair all Class Computers under the settlement terms, this does not mean there
 20 are *no* parts outside the settlement context. To the extent HP or other computer repair centers
 21 have parts, Class Members may pay for repairs if they prefer to keep their existing computers
 22 and then seek reimbursement through the Settlement. Consumers who prefer their computers,
 23 including the Brown Movants, can still fix their computer free of charge. The new computer
 24 relief available to Class Members here is even greater than the relief available in the *Lundell*
 25 settlement, where this Court found:

26 The Settlement provides Class members 100% of their out-of-pocket expenses for
 27 certain qualifying repairs of the Dell Inspiron 5150 notebook computer and a new,
 28 limited one year extended warranty on the computers to cover qualifying repairs.
 The Court finds that these benefits to the Class are exceptional under the facts and
 circumstances of this case. Given the age and expected lifespan of the computers

1 at issue, it is particularly important that the Settlement provides relief now rather
 2 than after years of additional litigation.

3 *Lundell v. Dell, Inc.*, No. C 05-3970 JW/RS, 2006 U.S. Dist. LEXIS 90990, at *11 (N.D. Cal.
 4 Dec. 4, 2006).

5 Second, claims for reimbursement are not limited to repairs by HP. Under the Settlement
 6 Agreement, Class Members may seek repair at any number of third party repair shops, and still
 7 be reimbursed for the expense. Settlement Agreement ¶ 2.10.

8 The benefits of the Settlement in its current form are substantiated by the claims made
 9 and processed to date. As of March 4, 2011, with the claims window open until March 14, Class
 10 Members submitted claims for 18,942 replacements. Rosenthal Decl. ¶ 6. The 18,942 HP
 11 replacement claims submitted are over two thirds of the total claims submitted. A total of 28,355
 12 claims were filed, meaning the HP replacement claims constitute approximately 70% of the total
 13 filed claims. These figures negate the Brown Movants' unsubstantiated argument that HP Class
 14 Members are not being placed on an equal footing with the Dell or Apple Class Members. This
 15 is particularly true considering HP owners constitute about 32% of the potential Settlement Class
 16 but account for approximately 70% of the claims. Horton Decl. ¶ 8.

17 The Brown Movants' speculation, without substantiating facts, about why Class
 18 Members are not submitting more replacement claims is not borne out by the overall rate of the
 19 claims themselves. Although the Apple and Dell claimants, and the cash reimbursement
 20 claimants, comprise a larger part of the noticed consumers, the replacement claims are coming in
 21 at a higher rate. In other words, the replacement computer options are clearly driving higher, not
 22 lower claims participation.

23 In sharp contrast to the over 18,000 requests by Class Members for replacements, Class
 24 Counsel received only 87 complaints regarding the Replacement Models. Of note, even
 25 including all complaints claimed by counsel for the Brown Movants, the total number of
 26 complaints appears to be less than 300. Laratro Decl. ¶ 11. This number includes the
 27 approximately 200 signatures on an internet "petition" that one of Mr. Frank's clients urged
 28 others to sign. But many of the "signatures" are not complaints at all, many are anonymous,

1 several are from outside the country and therefore unlikely to be from Class Members, and
 2 several are from owners of Dell or Apple machines. Indeed, one entry is from a Dell owner in
 3 Italy stating he would prefer the remedy afforded HP Class Members. *See Id.*, Ex. A, entry 132.
 4 Even were all 300 actual complaints, which they are not, this still represents only approximately
 5 1% of the total claimants, and an even lower percentage of all noticed Class Members.

6 Of the 87 complaints received by Class Counsel regarding the Replacement Models, 18
 7 relate to the originally inaccurately announced CQ50 as a replacement, and another 10 relate to
 8 the Asus which was originally provided as the sole replacement for the Tablet without any other
 9 option. Indeed, the majority of the complaints received — 52 of the 87 — were received before
 10 Class Counsel was apprised of, and corrected, the error on the Settlement Website to state that
 11 the replacement model for the Laptops would be the CQ56. The complaints further decreased
 12 when Class Counsel successfully negotiated for the option for Tablet owners to select either the
 13 Asus or the CQ56 as a replacement. Since that development was announced on February 16,
 14 Class Counsel received only 14 complaints regarding the replacement computers. Again, these
 15 figures pale in comparison to the over 18,000 HP owners who opted for a replacement computer.
 16 Finally, in contrast to these complaints, even as recently as March 3, Class Counsel was still
 17 receiving emails from HP owners not covered by the Settlement, who want to be included.
 18 Laratro Decl. ¶ 10.

19 **E. The Intent Of The Parties Must Be Considered**

20 As this Court stated in the *Facebook* case:

21 California has a strong policy in favor of enforcing settlement agreements. *Osumi v. Sutton*, 151 Cal. App. 4th 1355, 1357 (2007). Under California law, a
 22 settlement agreement “must be interpreted as to give effect to the mutual intention
 23 of the parties as it existed at the time of contracting.” *Roden v. Bergen Brunswig Corp.*, 107 Cal. App. 4th 620, 625 (2003); *see* Cal. Civ. Code, § 1636.

24 *The Facebook, Inc. v. ConnectU, Inc.*, No. C 07-01389 JW (N.D. Cal. June 25, 2008) (order
 25 granting motion to enforce settlement agreement). Looking at this Settlement Agreement as a
 26 whole, the negotiations described above and the efforts taken by the parties to properly evaluate
 27 the Replacement Models, it is clear the Replacement Models satisfy the intent of Paragraph 2.6.
 28 The Replacement Models fulfill similar functions, and do so in a comparable or even better

1 fashion than their predecessors. This is confirmed by Dr. Bagherzadeh's reports. Further,
 2 Replacement Models provide Class Members with a computer that, satisfies the class action
 3 settlement standard of fair, reasonable and adequate. This does not mean recreating each
 4 individual feature of a Class Computer. As Dr. Bagherzadeh noted, there must also be a
 5 recognition that "the amount of computing in terms of Millions of Instructions Per Second
 6 (MIPS) per dollar is constantly increasing, meaning every year computers are getting cheaper for
 7 a given performance rating . . . this cost reduction per feature set should be considered when
 8 comparing replacement units with originals, and it is not necessary to provide a replacement that
 9 meets the originals' exact cost as long as the main features are generally comparable." Tablet
 10 Report at 4.

11 **F. The Brown Movants' Proposed Relief Is Subjective And Arbitrary**

12 The Brown Movants' requested relief is wholly inappropriate. As an initial matter, "[i]t
 13 is not a district judge's job to dictate the terms of a class settlement; he should approve or
 14 disapprove a proposed agreement as it is placed before him and should not take it upon himself
 15 to modify its terms." *Brooks v. Georgia State Bd. of Elections*, 59 F.3d 1114, 1120 (11th Cir.
 16 1995) (quoting *In re Warner Commc'n's Sec. Litig.*, 798 F.2d 35, 37 (2d Cir. 1986)). The Brown
 17 Movants ignore this precept, asking this Court to rewrite the Settlement Agreement, by
 18 mandatory injunction with [over] 27 new terms. *See* Brown Movants' Proposed Order.

19 Further, the Brown Movants' requested relief is unsupported by their proffered
 20 "evidence." The Vlastone Report - by a lay person versed in home and car entertainment
 21 installation — either does not mention the features sought by the Brown Movants, or fails to
 22 consider them holistically. For example, the Brown Movants demand both touch screens and
 23 media remote controls, but the Vlastone Report mentions neither and, of note, the Asus is
 24 equipped with a touch screen. Tablet Report at 3. The Vlastone Report highlights the
 25 importance of WiFi-n capability but the CQ56, unlike the original Laptops, has 802.11n, "which
 26 is a more advanced WiFi standard." Laptop Report at 3. Further, Vlastone raises the importance
 27 of claimants being able to keep their hard drives but if HP Class Members ask, they are permitted
 28 to remove their hard drives before shipping. And, the Brown Movants fail to explain why the

1 remaining items of requested relief are “crucial,” in light of Dr. Bagherzadeh’s extensive (and
 2 learned) explanations to the contrary. In short, the Brown Movants cherry-picked certain
 3 features from a panoply of thousands of computers, and now claim to be dissatisfied with the
 4 absence of these features in the Replacement Models, with no consideration of the off-setting
 5 advantages from technological advancements, new computer features, and additional product
 6 warranties.

7 **III. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE**

8 The applicable standard for evaluating the Settlement, including the new Replacement
 9 Models, is whether the Settlement is fair, reasonable and adequate. *Officers for Justice v. Civil*
 10 *Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
 11 1026 (9th Cir. 1998); *Torrisi v. Tuscon Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993). In
 12 determining the adequacy and reasonableness of a proposed settlement, where the settlement is
 13 reached through arm’s-length bargaining, where investigation is sufficient to allow counsel and
 14 the Court to act intelligently, where counsel is experienced in similar litigation, and where the
 15 percentage of objectors is small, the settlement is presumed to be fair. *See In re Consol.*
 16 *Pinnacle W. Sec. Litig.*, 51 F.3d 194, 197 n.6 (9th Cir. 1995); *Fulford v. Logitech, Inc.*, No. 08-
 17 cv-02041 MC, 2010 U.S. Dist. LEXIS 29042, at *6 (N.D. Cal. Mar. 5, 2010). This presumption
 18 continues to be properly applied to the implementation of this Settlement.

19
 20 **A. Plaintiffs Undertook Significant Efforts to Vet the Suitability of the
 Replacement Models**

21 After Plaintiffs’ expert reviewed the suitability of the Replacement Models, Class
 22 Counsel engaged in further negotiations with NVIDIA in an effort to allow Tablet Class
 23 Members to have a choice between the CQ56 and the Asus. The discussions between Plaintiffs
 24 and NVIDIA were rigorous. Westerman Decl. ¶ 8. The parties conducted the entire Settlement
 25 negotiation process - including the discussions regarding the Replacement Models - at arm’s
 26 length and in an adversarial manner. Contrary to Movants’ speculation, there was no collusion.
 27 Westerman Decl. ¶ 10; *see also* Decl. of the mediator, Hon. Layn Phillips (Dkt. 256-2).

1 **B. Experienced Counsel Recommend Approval of the Replacements**

2 Significant weight is placed on the endorsement of a settlement by plaintiff's counsel. *In*
 3 *re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, MDL Dkt. No. 901, 1992 U.S. Dist.
 4 LEXIS 14337, at *8 (C.D. Cal. June 10, 1992) (finding belief of counsel that the proposed
 5 settlement represented the most beneficial result for class compelling factor in approving
 6 settlement); *Kirkorian v. Borelli*, 695 F. Supp. 446, 451 (N.D. Cal. 1988) (when the counsel
 7 recommending approval of the settlement are competent and experienced, significant weight may
 8 be given to their opinion). Here, experienced counsel negotiated the Settlement and the
 9 Replacement Models to timely benefit the Settlement Class.

10 Plaintiffs' goal throughout was to obtain a fix of the defective NVIDIA GPUs at issue
 11 and obtain the right for Settlement Class Members to seek reimbursement for out-of-pocket
 12 expenditures to fix the defect. Plaintiffs were successful in realizing these goals. Counsel has
 13 significant experience in complex class action litigation. *See* Westerman Declaration submitted
 14 for the final approval hearing. Dkt. 258. Where the Settlement and the choice of Replacement
 15 Models is the product of serious, informed, non-collusive negotiations after over two years of
 16 contentious litigation, the Court should attribute significant weight to the belief of experienced
 17 counsel, and their independent expert, that the implementation of this Settlement is in the best
 18 interest of the Class.

19 **C. The Class Members' Reaction to the Settlement Relief is Instructive**

20 Over 26,000 Class Members already filed claims seeking relief under the Settlement. Of
 21 those, over 18,000 are awaiting a replacement computer. Compared to this response to the
 22 Settlement, only 87 unverified Class Members complained to Class Counsel about the
 23 Replacement Models. Laratro Decl. ¶ 8. That is to say, even including the total number of
 24 complaints claimed by the Brown Movants, approximately 1% of the Class Members
 25 complained about the Replacement Models. This is an infinitesimal percentage of Class
 26 Members, and a strong factor weighing in favor of this Settlement. *See, e.g., Browning v.*
 27 *Yahoo! Inc.*, No. C04-01463 HRL, 2007 U.S. Dist. LEXIS 86266, at *37-38 (N.D. Cal. Nov. 16,
 28 2007) (finding "[t]he relatively low percentage of objectors weighs in favor of approval").

1

2 **D. The Few Individual Complaints Confirm This Settlement Is Superior**
 3 **To Continued Litigation**

4 The Brown Movants' assertions regarding individual features of their computers
 5 allegedly not found in the Replacement Models demonstrate the risks in litigating these claims as
 6 a class. *See generally Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998)
 7 (whether a settlement is fair is determined by "a balancing of several factors which may include .
 8 . . . the risk of maintaining class action status throughout the trial"). The question is not whether
 9 the Settlement provides Class Members everything they could hope to recover, but whether the
 10 Settlement is a fair, reasonable and adequate arm's length *compromise* of a dispute. *See*
 11 *Browning*, 2007 U.S. Dist. LEXIS 86266, at *17 ("[S]ome objectors complain that they should
 12 get a full cash refund. This is tantamount to complaining that the settlement should be 'better,'
 13 which is not a valid objection."); *Linney*, 151 F.3d at 1242 ("Appellants offer nothing more than
 14 speculation about what damages might have been won had they prevailed at trial. . . . [I]t is the
 15 very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that
 16 induce consensual settlements. The proposed settlement relief is not to be judged against a
 17 hypothetical or speculative measure of what might have been achieved by the negotiators.")
 18 (internal quotations and citations omitted); *Hanlon*, 150 F.3d at 1027 ("[I]t is possible, as many
 19 of the objectors' affidavits imply, that the settlement could have been better. But this possibility
 20 does not mean the settlement presented was not fair, reasonable or adequate. Settlement is the
 21 offspring of compromise."). To adhere to the Brown Movants' whims and require the computer-
 22 by-computer analysis — for tens of thousands of Class Members - set forth in their Proposed
 23 Order is contrary to the very nature of a settlement.

24 This Settlement is fair, reasonable and adequate in all respects and should not be shut
 25 down by five individuals seeking specification by specification perfection in a replacement
 26 model, especially when the replacements are superior or equal in all material respects. Many of
 27 the features the Brown Movants demand can be achieved through their purchase of inexpensive
 28 peripherals for features of individual significance to them. For example, USB based Bluetooth is

1 available for under \$10, as are camera units with better resolution than the original laptops. *See*
 2 Report # 3. Many of the Brown Movants' other complaints are plainly irrelevant. Firewire is a
 3 technology falling out of favor with users because, for only 15% more speed, it increases the
 4 costs of peripherals - many new laptops no longer use Firewire and, of note, it is now used
 5 primarily in Apple computers, not PC's. *Id.* Likewise, the brand name of the laptop is in this
 6 case irrelevant - HP and Compaq are the same company, and the same entity backing warranties.
 7 The Brown Movants' complaint that they are receiving a Compaq instead of an HP is
 8 immaterial. *Id.* The remainder of the Brown Movants' complaints can be attributed to the
 9 march of time. In short, the Settlement is fair, reasonable, and adequate.

10 **IV. THE BROWN CLASS MOVANTS' COUNSEL IS NOT MOTIVATED TO**
 11 **PROTECT CLASS MEMBERS' INTEREST, BUT RATHER HIS SELF-**
PROFESSED GOAL OF TORT REFORM

12 Contrary to his representations that his actions are intended to benefit members of class
 13 actions, Ted Frank, counsel for the Brown Movants, is motivated by a tort reform agenda. How
 14 else does one explain filing a mandatory preliminary injunction motion, without even mentioning
 15 the legal standard, while aggressively blogging about this motion and seeking media attention.
 16 There is greater concern about lay opinion than addressing the required legal standard with the
 17 Court. Frank holds himself out as a "leading tort-reform advocate." *See*
 18 <http://centerforclassactionfairness.blogspot.com/> (quoting Peter Lattman, "Trial Lawyers Defend
 19 Themselves While Taking on Terrorism", Wall Street Journal Law Blog, October 30, 2006,
 20 available at <http://blogs.wsj.com/law/2006/10/30/trial-lawyers-defends-themselves-while-taking-on-terrorism/>). Indeed, Frank reiterated his status as a "tort reform advocate" as recently
 21 as March 1 of this year. *See* <http://www.pointoflaw.com/archives/2011/03/the-nvidia-clas.php>.
 22 While he is probably a fine tort reform advocate, seeking publicity for trying to shut down this
 23 settlement is not in the interest of the Class.

25 Frank's status as a professional objector to class action settlements is well documented.
 26 *See In re HP Inkjet Printer Litig.*, No. C-05-3580 JF (PVT) (N.D. Cal. filed Jan. 17, 2011),
 27 Declaration of Niall P. McCarthy In Support of Plaintiffs' Motion For Final Approval of Class
 28 Action Settlement, (Dkt. 272) at Ex. 3 (listing over 10 cases in which Ted Frank either objected,

1 himself, or represented an objector). Simply stated, the missing injunctive legal analysis, the
 2 overly complex proposed order and the aggressive publicity seeking reveal that the goal is to
 3 play with this valuable settlement at the expense of Class Members who are in the process of
 4 obtaining their relief.

5 In stark contrast to the respected and independent Ph.D. in Electrical Engineering hired to
 6 evaluate the proposed Replacement Models, the Movants' counsel chose to rely upon Michael A.
 7 Vlastone.

8 Unlike Dr. Bagherzadeh, who earned a Ph.D. in Electrical Engineering from the
 9 University of Texas, Austin in 1987, and who has more than 20 years of experience in his field,
 10 Mr. Vlastone is unqualified to evaluate whether the proposed replacement computers are "of like
 11 or similar kind." Vlastone lacks any advanced degree or educated experience evaluating
 12 computer systems. Further, documents filed in the class action, *In re HP Laser Printer Litig.*,
 13 No. 07-0667 AG (RNBx) (C.D. Cal. filed June 6, 2007) (the "HP Printer Case"), reveal Vlastone
 14 was an objector. In the Vlastone Report, Vlastone holds himself out as a "professional computer
 15 consultant" and "experienced technology advisor for class action litigation." Vlastone Report at
 16 1; *see also* Vlastone Report at 2 (describing Vlastone as a "highly qualified computer consultant
 17 with specific expertise in advising clients on budgeting for and selecting appropriate laptops").

18 When deposed as an objector in the HP Printer Case, Vlastone's testimony revealed that
 19 Vlastone is an installer of iPod based home entertainment systems. Vlastone testified that he is
 20 self-employed by an entity named iShine. *See* Deposition Transcript of Michael A. Vlastone
 21 dated January 25, 2011 ("Vlastone Tr."); Declaration of Gina Tufaro ¶ 5, Ex. A at 97. According
 22 to Vlastone, "iShine is a multi-media environment based on Macintosh computers that enables a
 23 family to have access to a very media-rich environment . . . Its sort of like a mega iPod you can
 24 say." Vlastone Tr. at 97. It does not appear that Vlastone advises individuals on which laptops
 25 to purchase, other than Apple Macintosh. *See* www.ishine.com/code/about.htm (last visited
 26 March 2, 2011) (stating that Vlastone "design[s], build[s], deploy[s] and support[s] digital
 27 entertainment systems (DES) for residences and cars.") Vlastone's "qualifications" stand in
 28 stark contrast to those of Dr. Bagherzadeh. Bagherzadeh Decl., Ex. A.

1 In 2007, the first of the HP Printer Cases was filed. Shortly after that action was filed,
 2 Vlastone approached plaintiffs' counsel in the HP Printer Case. Vlastone Tr. at 25, 30, 34, 43-
 3 44. During an in-person meeting with counsel, Vlastone informed counsel that he had a strategy
 4 that counsel had not advanced that would be beneficial to its prosecution of the HP Printer Case.
 5 Vlastone Tr. at 76-78. During that meeting, Vlastone also suggested that counsel purchase a
 6 building and that iShine operate as a tenant free of charge in that building. Vlastone Tr. at 25,
 7 30-32, 34, 43-44, 100. Plaintiffs' counsel in the HP Printer Case informed the court that it
 8 interpreted Vlastone's purchase proposal as a request by Vlastone that counsel purchase the
 9 building in lieu of compensating Vlastone for the services that he would render as a consultant in
 10 the HP Printer Case. Counsel rejected Vlastone's offer, because, as counsel represented to the
 11 court, counsel was troubled both by Vlastone's purported strategy, as well as the building
 12 purchase proposal. *See* HP Printer Case, Plaintiff and Class Representative Kelsea Baggett's
 13 Separate Response to the Young and Vlastone Objections to the Class Action Settlements, Dkt.
 14 232 at 4-5; *see also* Vlastone Tr. at 25, 30, 34, 43-44; *see also* Plaintiff and Class Representative
 15 Kelsea Baggett's Report on Investigation of Objector Michael A. Vlastone, Dkt. 238, at 2
 16 (enumerating the many misrepresentations purportedly made by Vlastone during the course of
 17 the HP Printer Case, which were revealed by his deposition testimony).

18 It is clear that Vlastone is operating, here, not as an "expert," but someone with an
 19 agenda to repeatedly object to class settlements. Vlastone's background and conduct render his
 20 motivations and opinion unreliable and raise further questions about his selection by Movants'
 21 counsel.

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 2 **V. THE BROWN MOVANTS ARE NOT ENTITLED TO INJUNCTIVE
 3 RELIEF**

4 The Brown Movants do not satisfy the requirements necessary to obtain injunctive relief.⁵
 5 A “preliminary injunction is an extraordinary and drastic remedy, one that should not be granted
 6 unless the movant, by a clear showing, carries the burden of persuasion.” *Mazurek v.
 7 Armstrong*, 520 U.S. 968, 972, 117 S. Ct. 1865, 1867 (1997) (quoting 11A Charles Alan Wright
 8 et al., *Federal Practice & Procedure* § 2948, at 129-30 (2d ed. 1995); *see also San Jose Entm’t
 9 Grp. v. City of San Jose*, No. C 11-00207 JW, at 1 (N.D. Cal. Feb. 16, 2011) (order denying
 10 preliminary injunction). Far from making the requisite “clear showing,” the motion makes
 11 absolutely no reference to elements for injunctive relief, even when it discusses the relief sought.
 12 *See Motion at 18-19.*

13 Before an injunction can issue, the Brown Movants must clearly establish four elements.
 14 *San Jose Entm’t Grp.*, No. C 11-00207 JW at 1; *Alliance for the Wild Rockies v. Cottrell*, No. 09-
 15 35756, 2011 U.S. App. LEXIS 1473, at *10 (9th Cir. Jan. 25, 2011). Nowhere do the Brown
 16 Movants mention — let alone apply — the four elements of injunctive relief to the facts of this
 17 case. The Brown Movants may not “sand bag” by raising for the first time and then addressing
 18 the specific injunction elements on reply. *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir.
 19 2007) (“The district court need not consider arguments raised for the first time in a reply brief.”)
 20 (citing *Koerner v. Grigas*, 328 F.3d 1039, 1048 (9th Cir. 2003)). Regardless, they cannot satisfy
 21 the requirements for injunctive relief.

22 **A. Likelihood of Irreparable Harm**

23 The Brown Movants must “demonstrate a likelihood that absent the injunction,” they
 24 “will be irreparably harmed” by continuation of the claims administration process. *See Maxim
 25 Integrated Prods., Inc. v. Quintana*, 654 F. Supp. 2d 1024, 1035 (N.D. Cal. 2009). But the
 26 “possibility that adequate compensatory or other corrective relief will be available at a later date,
 27 in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.” *Lydo*

28 ⁵ Of note, the Brown Movants are also not entitled to, nor make any showing for, the discovery
 29 they seek in their Notice of Motion.

1 *Enter., Inc. v. Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984); accord *Davoodi v. Imani*, No. C
 2 11-0260 SBA, 2011 U.S. Dist. LEXIS 17758, at *19 (N.D. Cal. Feb. 9, 2011). Even were the
 3 Court to determine the Brown Movants are entitled to replacement models different from those
 4 currently available under the Settlement, the Brown Movants fail to show how “adequate
 5 compensatory or other corrective relief” will not be available to them. *See Lydo*, 745 F.2d at
 6 1213. This alone prevents the Court from issuing the requested injunction. *See Alliance for the*
 7 *Wild Rockies*, 2011 U.S. App. LEXIS 1473, at *21 (“plaintiffs may not obtain a preliminary
 8 injunction unless they can show that irreparable harm is likely to result in the absence of the
 9 injunction”).

10 There is no irreparable harm because, as demonstrated above, the replacement computers
 11 being offered satisfy the terms of the Settlement, and they are consistent with the applicable
 12 standard, *i.e.* that the Settlement be fair, reasonable, and adequate.

13 **B. Likelihood of Success on the Merits**

14 Nor do the Brown Movants demonstrate a likelihood of success on the merits of their
 15 motion: (i) Plaintiffs’ qualified expert concluded that the Replacement Models comply with the
 16 requirements of the Settlement Agreement; (ii) the parties conferred in good faith and negotiated
 17 at contested arm’s length to arrive at the Replacement Models; and (iii) as part of the Settlement
 18 as a whole, the Replacement Models are a “fair reasonable and adequate” component of the
 19 entire remedy. As detailed above, the Brown Movants fail to establish anything to the contrary
 20 in their motion. No “serious questions” on the merits are set forth in the moving papers. *See*
 21 *Alliance for the Wild Rockies*, 2011 U.S. App. LEXIS 1473, at *28. The Brown Movants are
 22 unable to show the Settlement, including the Replacement Models, is not fair, reasonable and
 23 adequate and, therefore, have no likelihood of success on the merits.

24 **C. Balance of Hardships**

25 “A plaintiff seeking a preliminary injunction must establish that the balance of equities
 26 tips in his favor.” *Maxim Integrated*, 654 F. Supp. 2d at 1036. In balancing hardships, the Court
 27 “will look to the possible harm that could befall the various parties.” *Id.* Here, the balance of
 28 hardships militates strongly against enjoining the Settlement. An injunction would prevent

1 NVIDIA from shipping new Replacement Models to over 16,000 Class Members who filed
 2 claims and after years of tolerating defective GPU's are awaiting receipt of a new computer. It
 3 would also undo the approximately \$2 million spent by NVIDIA for the Class' benefit to get the
 4 administration to this point. It surely cannot be equitable for a few disgruntled Class Members to
 5 stop Class relief which is in progress. As this Court found in a similar settlement, “[g]iven the
 6 age and expected lifespan of the computers at issue, it is particularly important that the
 7 Settlement provides relief now rather than after years of additional litigation.” *Lundell*, 2006
 8 U.S. Dist. LEXIS 90990, at *11. The claimants are already retrieving their defective computers
 9 and simply waiting for their replacement to arrive. Delivery of the new computers should
 10 proceed on schedule and not be delayed.

11 The reaction of Class Members as part of the standard for resolving the fairness,
 12 reasonableness, and adequacy of a settlement is instructive here. Over five million notices were
 13 sent, over 28,000 claims were filed, and the Brown Movants indicate awareness of “dozens” of
 14 persons that actively sought representation and “over a hundred” that were willing to sign
 15 declarations. Brown Motion at 7. Class Counsel received 87 complaints about the replacement
 16 computers, some of which were submitted by the Brown Movants and likely the same group of
 17 “dozens” that the Brown Movants cite. Of that number, 52 complained to Class Counsel about
 18 the Laptops replacement before the correction from CQ50 to CQ56, and only 14 have
 19 complained since the election between the CQ56 and the Asus for Tablet owners was announced.
 20 Class Counsel’s overall estimate of up to 300 total complaints — who are not necessarily Class
 21 Members, or even objectors, thus likely overstates the negative reaction.

22 **D. Public Interest**

23 Finally, the Court “must consider whether an injunction is in the public interest.” *Maxim*
 24 *Integrated*, 654 F. Supp. 2d at 1036. Again, in their moving papers, the Brown Movants make
 25 no showing that the requested injunction is in any way in the public interest. The failure to even
 26 discuss this element, while seeking publicity, conclusively demonstrates this motion was filed for
 27 someone’s personal promotion, but not the public interest. Because the Brown Movants made no
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1 showing, let alone the requisite “clear showing,” the Court should deny their request for
2 injunctive relief.

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2 **VI. CONCLUSION**
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4 Plaintiffs respectfully request that this Court deny the Brown Movants' motion.
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6 DATED: March 4, 2011
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